

TESTIMONY OF MARCUS J. LEMON
FORMER CHIEF COUNSEL, FEDERAL HIGHWAY ADMINISTRATION

Introduction

- Thank you for the opportunity to discuss these issues with the committee.
- Appointed by President Bush as Chief Counsel to FHWA.
- Served as one of the primary officials responsible for implementing the Bush Administration P3 policies, stood up P3 Office at FHWA, and provided key counseling on P3 initiatives.
- Over 15 years of experience with project finance and P3s.

The \$550mm loan does not create \$2.2B in new federal money for Michigan.

- Federal funds are already apportioned, by year, at a fixed amount, by statute, SAFETEA-LU, and is only authorized through March 2012. Potentially could be cut up to 35% in reauthorization.
- Federal funds are non-discretionary, paid to state if state can match (90/10 or 80/20) (See Federal Pots of Money Chart, and State Matching Process Chart).
- Federal funds are limited by statute and capped yearly. Only so much is given per year. Federal funds are apportioned by formula in statute, and then actual "obligation authority" is lower (taking into account budget scoring and economic conditions). "Obligation Authority" is lower - the actual federal promise to pay of available funds. \$1.092B apportionment in 2010, versus \$973mm actual obligation authority).
- Additional money from Michigan will not trigger a commensurate increase in federal matching capabilities over time because federal funds are set in statute and capped.
- If a state comes up with more matching funds, that does not generate more federal funds. (This was acknowledged in the MDOT State Plan 2011-2015 at page 13). Recent reports suggesting \$2.2B in new federal money are false.
- Michigan already has enough funding to make its match every year. It does not need the NITC to fill its shortfalls.
- NITC spending will not increase the pool of available federal funds.
- There are no earmarks for NITC.
- No federal commitment for any funds for NITC, nor \$260mm for the customs plaza, or maintenance. No P3 partner identified.
- Other state projects will not move up to construction simply as a result of NITC spending.

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- \$550mm cannot accelerate use of federal funds. There is no detailed spending plan from MDOT as to how it would implement the \$550mm. Effect will ripple through the STIP and cause project delays for other projects and STIP is amended; other matching projects affected.
- Ripple effect through STIP would cause Michigan to reevaluate project timing and funding designs, leading to many project delays for other much-needed projects. Projects would suddenly be off again/on again based on the timing of the available "match" and their matching share would be altered after the loan infusion.
- Alleged shortfalls can easily be filled by other means: toll credits, reform PA 51 (all revenue to transportation); more efficient use of matching funds. All states have always found ways to meet their match requirements.
- \$550mm is NOT free money as Michigan gives up revenue share for decades, as a loan, with all revenue going to pay loan.
- NITC lacks several P3 fundamentals. No written agreement for the purported loan; no detailed spending plan; no federal or P3 commitments. Major questions unanswered: Only Canadian firms used? What are rights and obligations of the parties? What guarantees does Michigan have in writing? What if the loan fails to materialize? What guarantees can be provided to contractors? How would failure affect Michigan credit?
- Unclear whether the \$550mm is a "loan", a "donation", "equity interest", "contribution", or "obligation"? Various officials have used all these terms, and all have different legal significance. (See attached clip). This creates uncertainty as to what are the rights and obligations of all parties, compounded by a complete lack of any loan documentation by comprehensive agreement as we would normally see. No P3 partner, no federal funding, no detailed finance plan. Raises many red flags.
- News articles: "\$2.2B in federal money/funds" is false. Implies lump sum or new federal money. \$2.2B in "matching capability" is more accurate.
- MDOT's 5 Year plan admits that "no new federal money" is created by \$550mm:
 - o "Match All Federal Aid" Scenario admits no new federal funds (page 13). There is also no analysis to back up the claim of insufficient matching funds based on the required allocations of state funds under Public Law 51 as it currently stands.
 - o Federal highway funding assumed in the report at 2009 levels for 2011 and 2012, then increasing at 3.2 percent per year for 2013-15 (this is completely unrealistic). Federal funds likely to decrease up to 35%.
 - o Says Canadian \$550MM to be used to build the I-75 interchange and local road improvements (no mention of NITC plaza or maintenance costs).

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o What this confirms is that there are no new or additional federal funds to be had and that the "Match All Federal Aid" scenario simply allows MDOT to avoid leaving capped federal money from Michigan's regular apportionments unused in any given year. Creates no new federal funds. Central point becomes the several different ways available to match federal funds.

Michigan has enough revenue to cover its shortfall and has better options.

- Michigan does not need the \$550mm. It can easily plug shortfalls through toll credits, matching funds flexibility, and reforms to PA 51 through SB 351 and HB 4521. State can also match through funds, materials, services, new right of way, or compliance costs. More efficient use of matching pots through flexibility and interchangeability.
- Michigan should restructure its use of state fuel tax revenues to ensure all revenue goes solely to transportation.
- Michigan takes in nearly \$2B of revenues designated for transportation. After paying all money due on transportation debt, Michigan still has \$1.5B left over. Michigan only needs to spend \$240mm of the \$1.5B to get all federal match.
- Michigan must simply prioritize its spending of transportation dollars so that the first priority is on matching funds projects, to obtain its federal match, and make use of innovative ways to meet match; overhaul PA 51; use toll credits.
- Michigan does not need to take away funds from non-transportation funding (such as education) in order to meet that match. Simply overhaul Act 51 and utilize toll credits, along with more efficient use of matching funds.
- Other state have better P3 legislation, better legislative oversight, and better usage of federal matching funds (FL, VA, GA).
- Most importantly, there is no written agreement defining the rights and obligations of the parties with respect to the \$550mm and thus more questions are raised than answered.
- Michigan needs to step back and look at comprehensive P3 legislation away from the politics of this one risky project. Need more transparency, more oversight, and should not back into P3 legislation through one project. Better approach is like FL, GA, VA, who enact comprehensive P3 legislation first, and then methodically go out and evaluate all P3 projects with transparency and oversight.
- In my expert opinion, this project, and this legislation, is not in Michigan's best interest.